

1950

1949 Report of Aeronautical Law Committee of American Bar Association

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Recommended Citation

L. Welch Pogue, et al., *1949 Report of Aeronautical Law Committee of American Bar Association*, 17 J. Air L. & Com. 99 (1950)
<https://scholar.smu.edu/jalc/vol17/iss1/8>

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STATE AND LOCAL

Department Editor: Madeline C. Dinu*

1949 REPORT OF AERONAUTICAL LAW COMMITTEE OF AMERICAN BAR ASSOCIATION

THE Standing Committee on Aeronautical Law herewith submits its report for 1948-1949.

THE ASSOCIATE AND ADVISORY COMMITTEE

Last year the House of Delegates authorized the appointment of an Associate and Advisory Committee. This committee, consisting of five members, has functioned as if it were a part of the Standing Committee. As indicated in last year's report, this enlarging of the opportunity to participate in aeronautical law activities should in time afford a better basis on which to decide the question of creating a Section on Aeronautical Law.

JURISDICTION IN THE AIR SPACE

In our form of Federal-State Government, the ebb and flow of interrelations between these two types of ruling authorities presents a constant procession of intriguing problems. One of these problems was raised by *United States v. Causby*, 328 U.S. 256 (1946). The case of *United States v. California*, 332 U.S. 19 (1947) developed additional and related problems. In the *Causby* case, the Supreme Court divided the air space into two zones, a lower zone in which private property exists as in state territory generally and an upper one in which the rights of the Federal Government are paramount. In the *State of California* case, the Supreme Court held that the state is not the owner of the three-mile marginal ocean belt along its coasts or the lands underlying that belt. These two cases and some of the numerous and interesting questions which they present are ably discussed by a former Chairman of the Committee on Aeronautical Law, Mr. John C. Cooper, in an article entitled "State Sovereignty vs. Federal Sovereignty of Navigable Airspace," published in the *JOURNAL OF AIR LAW AND COMMERCE*, Volume 15, page 27. Mr. Cooper, who is now a member of the Institute for Advanced Study at Princeton University, has also analyzed the *State of California* case in a most competent manner in a letter, dated March 5, 1948, to Honorable Alexander Wiley, who was at that time the Chairman of the Committee on the Judiciary of the United States Senate.

The Committee on Aeronautical Law at its meeting in Chicago on January 30, 1949, decided that these two cases open up such important fields for legal research as to make it desirable to promote a broad scale study of the cases and their implications by one of the leading law schools of the country. The committee is endeavoring to secure an undertaking by some such law school to study, report upon, and make recommendations upon the following questions, or such revised or different phrasing thereof, or of related matters, as may develop in the course of study:

- (1) What are the respective jurisdictions of the federal and state governments, and the related implications, growing from the division of the air

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space pursuant to the *Causby* decision into a lower zone in which private property exists and an upper zone in which the rights of the Federal Government in the public domain seem to be preserved?

- (2) How does the *Causby* case affect airport zoning and the rights and privileges of airfields, particularly small airfields in a metropolitan community?
- (3) In the light of the decision in the *California* case in which the court found that the State of California is not the owner of the three-mile marginal ocean belt along its coasts nor the lands underlying that belt, where are the seaward air space boundaries of the United States across which foreign aircraft cannot fly without the permission of the United States?
- (4) Is the air space over the marginal three-mile belt part of the territory of the adjacent states?

Numerous subsidiary and collateral questions are involved in the principal ones tentatively stated above. It is believed that if through committee sponsorship a thoroughly lawyerlike and scholarly approach can be made to the problems raised in these questions, a substantial contribution will be made in one of the most important fields of aeronautical law.

CIVIL AERONAUTICS BOARD'S ECONOMIC PROGRAM FOR 1949

The Civil Aeronautics Board (CAB) on February 21, 1949, took the unprecedented step of making available to the industry and to the public a statement of its policy, setting forth the Board's "Economic Program for 1949." By this constructive program, which was well received, the Board undertook for the first time to state in one place and in a compact and manageable form its attitude and its policy toward important regulatory matters. As indicative of its contents, the main headings are as follows: Mail Rates, Economy and Efficiency, Industry Financing, Routes and Competition, Commercial Rates and Fares, and Development of New Markets for Air Transportation. In connection with the issuance of this economic program, the Board instituted a number of investigations and issued rate and other orders, each of which constituted a step in carrying the program into effect.¹

SALE OF GASOLINE AND OIL AT AIRPORTS

On February 16, 1949, the Administrator of Civil Aeronautics wrote the chairman of the committee requesting the views of the committee concerning proposed changes in the somewhat detailed regulations by the Administrator under Section 11(1) of the Federal Airport Act with respect to the sale and delivery of aviation gasoline and oil on airports sponsored under the Federal Airport Aid Program. Under these regulations, the operator of an airport was permitted to grant an exclusive gasoline concession on the airport itself. However, gasoline could be purchased off the airport and brought on it for use, subject to certain restrictions.

Section 11(1) states that "As a condition precedent to his approval of a project under this Act, the Administrator shall receive assurances in writing, satisfactory to him, that the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination." Pursuant to this authority, the Administrator prescribed a detailed regulation under which, *inter alia*, gasoline and oil purchased off the airport could be required by the Sponsor to be stored in places designated by him, to be limited to the amount of storage space available, and to be dispensed and delivered in the manner required by the Sponsor. The Administrator suggested three detailed alternative proposals:

¹ A copy of this Economic Program for 1949, dated February 21, 1949, may be secured through Mr. M. C. Mulligan, Secretary of the Civil Aeronautics Board, Washington 25, D. C.

- (1) Eliminate the entire regulation dealing with services on an airport sponsored under the Federal Aid Airport Program and rely on the statutory language;
- (2) Eliminate just so much of the regulation discussed above dealing with the sale and delivery of aviation gasoline and oil; or
- (3) Substitute for the existing portion of the regulation regarding gasoline and oil a provision prohibiting exclusive concessions to any person other than the Sponsor of the airport himself.

This letter from the Administrator was circulated among the members of the committee and of the associate and advisory committee for comment. Most of the members sent in letters covering all phases of this proposed revision. The chairman of the committee did not feel, however, that without prior authorization of the House of Delegates, he could present the view of the committee as a whole, and therefore, sent the Administrator a digest of the various individual opinions presented which was acknowledged as being of great assistance in clarifying the problem.

The members in their comments raised several important points. One question discussed at length was whether an airport owner could ever grant an exclusive gasoline concession under the Anti-Trust laws or Section 303 of the Civil Aeronautics Act prohibiting exclusivity where the expenditure of Federal funds is involved. The question was also considered whether or not the Administrator was intended to have any authority at all derived from Section 11(1) to prescribe such detailed regulations dealing with the subject. Finally, the extent to which this problem was primarily a local problem to be dealt with in terms of the immediate factual situation rather than by blanket regulation on a national level was analyzed.

The chairman was advised on May 17, 1949, that the regulatory provisions dealing with the sale and delivery of gasoline and oil had been eliminated from the regulations, indicating an adoption of proposal (2) above. It would seem that the question of primary importance, that of exclusivity (which has not yet been officially decided), can be handled outside of the Federal Airport Act.

HOOPER COMMISSION

In its report to Congress, the Commission on Organization of the Executive Branch of the Government recommended the following, among other, changes in the organization of agencies exercising functions affecting aviation:

- (1) The Secretary of Commerce would be assigned the duty of developing an over-all route pattern for land, sea, and air. When individual carriers or groups of carriers make recommendations to the Civil Aeronautics Board at variance with his over-all route program, it is suggested that the Secretary appear before the Board to present his views. Similarly, it was felt advisable that he have the authority to initiate route changes.
- (2) The executive functions of the Civil Aeronautics Board would be transferred, insofar as possible, to a recommended Bureau of Civil Aviation, Department of Commerce. "Executive" functions were not defined.
- (3) The safety enforcement function, now exercised by the Civil Aeronautics Administrator, and the safety rule-making function, now exercised by the CAB, would be transferred to the Bureau of Civil Aviation. There would be a right of review in the CAB from the promulgation of specific rules or from the refusal to do so.

- (4) The National Advisory Committee for Aeronautics would also be placed in the new Bureau of Civil Aviation. This committee is presently an independent committee which supervises and directs fundamental research and scientific studies for civil and military aviation. The Commission doubted whether it was sufficiently important, despite its size, to warrant independent status. A dissenting Commissioner, however, pointed out that he did not feel that the organization problems of the committee had been sufficiently explored by the Commission to justify this definite recommendation since at least ten executive agencies, including the National Military Establishment, are concerned with the research it conducts.
- (5) The chairman of the CAB would exercise all administrative functions of the Board.
- (6) Statutory authority would be provided to permit the Board to delegate routine, preliminary, and less important work to members of the staff under the Board's supervision.

There were various other recommendations. Some of the recommendations applied to regulatory commissions generally, including the CAB.

This is the third current recommendation for the reorganization of the civil aeronautic agencies. The first was that of the President's Air Policy Commission, included in the Commission's report, entitled "Survival in the Air Age," and the second was the report of the Congressional Aviation Policy Board, created by Public Law 287 of the 80th Congress. Those portions of the Hoover Commission Report dealing with the civil aeronautics are found in the Hoover Commission's Reports on "Regulatory Commissions" and on the "Department of Commerce."

INTERNATIONAL AIR TRANSPORT AGREEMENTS

In last year's report, the committee reported that the United States is a party to thirty-six bilateral agreements with foreign countries providing for the operation of international airlines. Since that time four additional bilateral agreements have been entered into authorizing additional operations in this field.²

There have been no additional concrete plans made for carrying forward the efforts to secure a multilateral international convention on air routes since the failure to reach an agreement at the conference held in Geneva in the fall of 1947, as reported in last year's report.

WARSAW CONVENTION

As indicated in last year's report, the Legal Committee of ICAO is considering various modifications of the Warsaw Convention, including particularly whether or not the present liability limit of approximately \$8,291.87 should be raised. The Air Coordinating Committee has surveyed the United States' position, both within and outside government circles. The ACC has made every effort to secure the views of interested parties, including those of the committee. The responses of committee members to the solicitation

² The additional agreements are with Bolivia, Burma, Finland, and Panama. Of the 40 agreements, those requiring ratification which are still awaiting ratification are: Syria, Uruguay, Bolivia, and Venezuela. In addition to the 40 countries, Pakistan has adopted the agreement with India. The Argentina agreement is not in effect pending conclusion of an agreement on specific routes.

therefor, handled by Mr. William Burton, acting as a Subcommittee of one for the purpose, were made available in summary form to the ACC.

The United States' position with respect to the Warsaw Convention, taken before the Legal Committee of ICAO, was, in effect, as follows:

1. The United States approves of the existing limit of liability concerning cargo and baggage.
2. The United States would be opposed to any reduction in the limit of liability for the death of a passenger, but could support a moderate increase, if desired by the other contracting parties.
3. The United States feels that the existing limit of liability for serious injury, such as a permanent disability, is low and is hopeful that the other contracting parties will be prepared to incorporate a revision of this limit in a new convention if the study requested by the Second Assembly of ICAO indicates a clear need for a new convention.

ROME CONVENTION

The United States Government is taking the following positions before the Legal Committee of ICAO with respect to the Rome Convention dealing with the subject of liability for damage caused to third persons or property on the surface by aircraft operated internationally:

The United States Government is strongly in favor of changing the principle of the Rome Convention according to which the operator, with certain exceptions, is absolutely responsible for damage caused to third persons or property on the surface, to the principle that the operator shall be liable for damage to innocent third persons or property on the ground only if he is not able to prove that he had taken all measures to avoid damage and to avoid events leading thereto which an operator exercising the highest degree of care would have taken under the circumstances. In other words, the rule of absolute liability of the Rome Convention, adopted while aviation was in its infancy, should now be changed because experience has proved that aviation is no more dangerous than many other normal business activities.

There are numerous other positions which the United States Government has taken with respect to the proposed revisions of the Rome Convention and related matters.³

LEGISLATION DEALING IN CONTRACTS BETWEEN THE GOVERNMENT AND AIRCRAFT MANUFACTURERS

(1) *Profit Limitation and Pricing Policy*

The aircraft industry is faced today with a major problem through the anomalous situation of two statutes both applicable to the question of profit limitation on contracts with the Government for the procurement of aircraft and aircraft parts. The Vinson-Trammell Act of March 27, 1934, as amended (34 U.S.C. 495), provides for a profit limitation on aircraft construction of 12% based on actual costs. The Renegotiation Act of 1948 (Section 3 of Public Law 547, 80th Congress) requires renegotiation of all

³ For anyone interested in securing more detailed information of the United States' position in these respects, a copy of ACC 88/1C can be obtained from the Air Coordinating Committee, Washington, D. C.

contracts and subcontracts for the procurement of aeronautical equipment in excess of \$1,000 and, under the discretionary authority given the Secretary of Defense under Section 401 of Public Law 785 of the 80th Congress, it can be directed that all contracts for the procurement of aircraft and aircraft parts be subject to the provisions of the Renegotiation Act.

The committee fully recognizes that some sort of profit limitation may be necessary to protect the Government, but it believes that while either of these Acts alone would afford such protection, together they result in much costly duplication and administrative confusion to the aircraft industry and its suppliers without any additional advantage to the Government. The administrative procedures incident to compliance with both of these statutes place a tremendous and costly bookkeeping burden upon the contractor and subcontractor and require the maintenance by the Government of a large additional number of auditors and examiners.

The committee understands that at this time the question is being widely discussed in the National Military Establishment and the Bureau of the Budget and that it is contemplated that an amendment seeking to cure this overlap will soon reach Congress. Because the matter is in somewhat of a flux, the committee has refrained from taking a definite stand as to the preference of one or the other of these statutes either in their present or a possibly revised state. It does believe, however, that at least this overlap should be considered at an early date by Congress and that steps should be taken to provide that contracts or subcontracts subject to the recent Renegotiation Act should not be also subject to the existing Vinson-Trammell legislation.

The introduction of renegotiation as a new technique for eliminating excess profits in the aircraft industry has raised two additional problems which should be given immediate attention.

(a) It is suggested that serious consideration be given to the thought that the theory of averaging profits and losses, similar to the carry-back and carry-forward provisions of Section 122 of the Internal Revenue Code, be made applicable to the principle of renegotiation. A long period of processing before deliveries with attendant engineering and design changes inherent in aircraft production is now facing the industry. (It takes from two to seven years to complete a production contract for modern aircraft.) The averaging theory, fully recognized by the Government in the Internal Revenue Code, appears to be more equitable under these circumstances than renegotiation treatment on a fiscal year only basis. Thus, should in any year the amount of profit earned by the contractor or subcontractor be less than that to which he is entitled, such deficiency will first be applied against prior refunds of excess profits under the 1948 Act, if any, and secondly, the remainder shall be carried forward to future years to be offset as a reduction against any determination of excessive profits, if any, in such years. To the extent the deficiency is applied against prior years' excessive profits, the contractor or subcontractor should be entitled to a refund from the Government. It would seem that this principle could be effectuated in regulations issued by the Secretary of Defense pursuant to the Renegotiation Act of 1948, but if the position now taken in various Government Agencies is correct that there is no authority therein for such action, curative legislation would be desirable.

(b) It would also seem advisable that it be optional with the contractor as to whether or not fixed price contracts with the price redetermination clause and incentive fixed price contracts, providing for a target price and a maximum price with price redetermination, shall be subject to renegotiation. It is believed that, in the main, price redetermination does serve the same

purpose as renegotiation and will eliminate needless and superfluous reviews and audits. The purpose of a target price contract is frustrated if the profit bonus earned by the contractor may be taken away from him on renegotiation, but he bears the possibility of loss if the maximum price is exceeded. Again, the committee does not take a position on which of these methods is preferable, but suggests that they should not overlap. It would seem that under the Renegotiation Act the Secretary clearly has power to remedy this situation through his authority to exempt "any other contract or subcontract, both individually and by general classes and types."

(2) *Settlement of Terminated Government Contracts*

A substantial portion of the overall business of aircraft manufacturers is represented by contracts to supply aircraft parts and technical services to various agencies of the Government. All such contracts reserve to the Government the right to terminate the contract for the convenience of the Government. When such terminations occur, the contractor is vitally interested in the proper settlement of his claim against the Government for costs resulting from the termination. Concern about the matter of prompt settlement of termination claims is currently being expressed by representatives of all types of industry engaged in any degree in contracting with the Government, but because of the proportion of its overall business which is represented by Government contracts, and because of changes in requirements by the various branches of the Armed Forces, the aircraft industry is particularly concerned about the matter.

The Contract Settlement Act of 1944 was enacted for the purpose of providing statutory authority necessary to enable the Government to accomplish expeditiously the difficult task of terminating claims arising out of the World War II program. It is the opinion of the committee that the great majority of termination settlements carried out under the authority of the Contract Settlement Act were entirely fair and reasonable, both to the Government and to the contractor, and resulted in great benefit to the people and to the economy of the country. The committee feels there may be some room for difference of opinion as to whether an agency of the Government may negotiate a settlement of a contractor's claim resulting from the termination of the contract without express statutory authority but there can be no room for disputing the fact that without such specific authority all negotiated settlements will be subject to review and re-appraisal with attendant uncertainty and confusion. The Contract Settlement Act of 1944 is not applicable to present Government contracts and the proper disposition of materials and property rendered unusable because of terminations has been seriously impeded due to inapplicability of the Surplus Property Act of 1944. Public Law 862 (80th Congress) makes it clear that surplus property disposition procedures based upon the statutory authority of the Surplus Property Act of 1944 may not be applied as to any property not declared surplus as of 30 June 1948.

The committee believes that serious consideration should be given to the question of legislation, both as to settlement of terminated contracts and as to disposition of surplus property, if the confused situation existing between World War I and World War II is to be avoided. The committee will not attempt to recommend any specific legislation but suggests that it might very well embody the general features of the Contract Settlement Act of 1944 which have been demonstrated to provide an effective framework within which to carry out termination settlements and should make

available adequate and workable property disposition procedures. Among the essential elements of such legislation which should be explored are the following:

- (a) Assurance of finality as to any settlement entered into in accordance with the provisions of the statute except, however, any such settlement as may have been procured by fraud.
- (b) Provision for adequate interim financing of contractors in event of terminations.
- (c) Provision for adequate regulations and procedures to carry out the objectives of such legislation and an overall authority to assure compliance with those regulations and procedures by the various Government contracting agencies.
- (d) Provision for appeal from determinations of contracting officers or contracting agencies to an independent appellate body similar to that of the Appeals Board of the Office of Contract Settlement where persons who deem themselves to have been aggrieved by such determinations may obtain a prompt and fair review.
- (e) Provision for adequate procedures to protect the interests of the Government in the disposition of material and property rendered surplus or obsolete by reason of terminations, to enable the contractor to clear his plant of such property and material without delay and thus permit him to resume normal operations with as little hardship as possible and to aid in obtaining adequate prices for such property and materials and eliminate unnecessary waste.

A solution to this problem is urgently needed at the present time in order to prevent mounting confusion, unnecessary cost and expense to the Government and hardship to the aircraft manufacturing industry.

Respectfully submitted,

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